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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAR -1 PM 3:08

JEANNE HICKS, CLERK ✓

BY: Heather Figueroa

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
PLEADING RE: THE PENALTY OF
DEATH IS UNCONSTITUTIONAL

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Pleading re: The Penalty of Death is Unconstitutional. This response is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant raises numerous objections to the death penalty and Arizona's capital sentencing statutes and asks this Court to find that the death penalty violates both the Arizona and United States Constitutions. The Arizona Supreme Court has consistently rejected these arguments. Moreover, the issue of the unconstitutionality of "death qualifying" a jury has been ruled upon by this Court. The State recognizes the importance of preserving arguments for

1 appeal; however, Defendant's positions regarding the unconstitutionality of the death penalty
2 in Arizona are legally unsupported and should be summarily rejected without oral argument.

3 **LEGAL ARGUMENT:**

4 ***I. Arizona capital sentencing statutes, which allow the imposition of a death sentence***
5 ***for certain first degree murder convictions, are constitutional.***

6 Defendant makes numerous claims regarding declining social support for the death
7 penalty and argues that as a maturing society, the United States should abolish the death
8 penalty altogether or we will be left standing alone in the industrialized international
9 community as the sole purveyor of a death sentence. Defendant also claims the death penalty
10 is not a deterrent to murder, serves no legitimate purpose¹, and has lost the "only
11 intellectually respectable support." (Defendant's Motion, Pg. 11:19-20.) While these issues
12 may be valid points for on-going debate, they are irrelevant to the issue before this Court.

14 Both the United States Supreme Court and the Arizona Supreme Court have upheld
15 the death penalty as a constitutional punishment for certain murders. The Arizona Supreme
16 Court has consistently upheld the death penalty as constitutional in cases where the defendant
17 has been convicted of first degree murder conviction and where at least one aggravating
18 factor has been proven before a jury beyond a reasonable doubt. *See, State v. Martinez*, 218
19 Ariz. 421, 189 P.3d 348 (2008); *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540 (2007); *State*
20 *v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006); *State v. Anderson*, 210 Ariz. 327, 111 P.3d
21 369 (2005); *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003), *State v. Salazar*, 173 Ariz. 399,
22 844 P.2d 566 (1992).

26 ¹ The argument that the death penalty does not deter and serves no legitimate purpose was
rejected by *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909 (1976).

1 ***A. Arizona's aggravating factors sufficiently narrow the class of persons eligible***
2 ***for the death penalty. The fact that these aggravators may be alleged in both***
3 ***capital and non-capital cases does not render them unconstitutional.***

4 Defendant argues that because the same aggravators can be alleged in a non-capital
5 case, Arizona's statutory scheme does not limit the death penalty to the "worst of the worst."
6 This is simply untrue. Our case law mandates that the death penalty is reserved for only the
7 worst, most shocking murderers. *State v. Willoughby*, 181 Ariz. 530, 549, 892 P.2d 1319,
8 1338 (1995); *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992); *State v. Fierro*,
9 166 Ariz. 539, 548, 804 P.2d 72, 81 (1990). Defendant's argument is legally unsupported
10 and without merit.

11 ***B. This Court has found that qualifying a death penalty jury is not***
12 ***unconstitutional.***

13 On January 13, 2010, this Court ruled that qualifying a death penalty jury is not
14 unconstitutional. Defendant's arguments under the heading "Jury Selection: How Death
15 Qualification Kills" are moot. *See also, Lockhart v. McCree*, 476 U.S. 162, 175-76, 106
16 S.Ct. 1758, 1766 (1986); *State v. Lee*, 189 Ariz. 608, 617, 944 P.2d 1222, 1231 (1997); *State*
17 *v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995); *State v. Atwood*, 171 Ariz. 576,
18 584, 832 P.2d 593, 641 (1992); *State v. Martinez-Villareal*, 145 Ariz. 441, 449, 702 P.2d
19 670, 687 (1985).

20 ***C. Post-Conviction and AEDPA.***

21 Should Defendant be convicted of 1st Degree Murder at trial and if the jury
22 determines that the death penalty is appropriate, the case will automatically be reviewed by
23 the Arizona Supreme Court. As demonstrated in *State v. Bocharski (Bocharski II)*, 218 Ariz.
24 476, 499, 189 P.3d 403, 426 (2008), the Arizona Supreme Court will overturn a jury's
25 determination that the death penalty is appropriate where there is reason to do so. In
26

1 *Bocharski*, the Court reduced the sentence to natural life even though the jury found that the
2 State had proven, beyond a reasonable doubt, the existence of two aggravating factors. The
3 Supreme Court found there was not enough evidence to support one of the aggravators and
4 ruled that the jury failed to properly consider the substantial mitigating factors.

5 Defendant's argument that the death penalty is unconstitutional due to the difficulty
6 of post-conviction appellate processes is without merit.

7
8 ***D. The prosecutor's discretion to seek the death penalty does not violate a
defendant's constitutional rights.***

9 Defendant argues that there are virtually no restrictions on the prosecutor's discretion
10 to seek the death penalty and that as a result, the system is "chaotic and unprincipled." This
11 argument was rejected by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S.
12 153, 199, 96 S.Ct. 2909, 2937 (1976) (pre-sentencing decisions by actors in the criminal
13 justice system that may remove an accused from consideration for the death penalty are not
14 unconstitutional); *see also State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992);
15 *State v. Harding*, 137 Ariz. 278, 292, 670 P.2d 383, 397 (1983).

16
17 ***II. The Death Penalty as it applies to Defendant.***

18 ***A. Presumption of Death***

19 Arizona death penalty statutes require a jury to impose a death penalty if it
20 unanimously finds one or more aggravating factors and then determines that "there are no
21 mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(E)².
22 Defendant claims the statute is unconstitutional because it does not allow individual jurors to
23 make the determination, but then readily admits the courts have found otherwise. The
24
25

26

² Renumbered as A.R.S. § 13-751 effective January 1, 2009. All references in this pleading
are to the statutes effective in 2008.

1 Arizona Supreme Court squarely rejected the “presumption” argument in *State v. Hoskins*,
2 199 Ariz. 127, 146, 14 P.3d 997, 1016 (2000); *see also State v. Salazar*, 173 Ariz. 399, 411,
3 844 P.2d 566, 578 (1992). Clearly, Defendant’s claim is without merit.

4 ***B. The Requirement of Unanimity for Death or Life Imprisonment.***

5 Defendant’s reliance on *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227
6 (1990), to argue that the Arizona death penalty statutory scheme is unconstitutional is flawed.
7 Mitigation is not limited, the jurors need not agree on which mitigating circumstances have
8 been proven by a preponderance of the evidence and each juror may individually determine
9 the nature and extent of the mitigation. What is required is that any verdict of death or life
10 imprisonment be unanimous. Moreover, Defendant admits that the Arizona Supreme Court
11 has rejected the unanimity argument. *See State v. Andriano*, 215 Ariz. 497, 161 P.3d 540
12 (2007).
13

14 ***C. Aggravators are sufficiently narrow.***

15 Defendant’s argument that Arizona statutes are too broad to sufficiently channel the
16 sentencer’s discretion in imposing the death penalty was rejected by the Arizona Supreme
17 Court in *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991).
18

19 ***D. A.R.S. § 13-703(F)(2)***

20 Defendant’s claim that the (F)(2) aggravator is too broad because any homicide that
21 takes place on or in the “victim’s home, car, garage or on other personal property” would be
22 death penalty eligible is preposterous. It is only when a defendant has been convicted of a
23 serious offense that (F)(2) applies. The fact that the statute has been amended to include a
24 serious offense committed on the same occasion as the homicide is not a violation of
25 Defendant’s constitutional rights. It simply reflects the public policy as enunciated by the
26

1 Arizona Legislature that a Defendant may not commit a murder and a serious crime at the
2 same time without risk of additional punishment, i.e., the Death Penalty. This is very similar
3 logic to imposing the Death Penalty upon someone that commits a homicide while
4 incarcerated. They don't get to commit a "freebie" serious offense. Defendant's argument is
5 without merit.

6
7 *E. A.R.S. § 13-703(F)(6)*

8 Defendant's claims regarding the (F)(6) aggravator are extremely premature and
9 ignore the fact that this Court will give appropriate instructions regarding what the State must
10 prove before the jury can determine that this aggravator exists. When the (F)(6) aggravator
11 was challenged as unconstitutionally vague, the Arizona Supreme Court found that the
12 following language contained sufficiently specific instruction regarding cruelty to foreclose
13 the challenge:
14

15 Cruelty goes to mental and physical anguish suffered by
16 the victim. Mental anguish occurs when the victim experiences
17 significant uncertainty about her fate. In order to constitute
18 cruelty, conduct must occur before death and while victim is
19 conscious. Conduct occurring after death or while a victim is
20 unconscious does not constitute cruelty. Before conduct can be
21 found to be cruel, the State must prove that the defendant knew
22 or should have known that the conduct would cause suffering
23 to the victim.

24 *State v. Cromwell*, 211 Ariz. 181, 189, 119 P.3d 448, 456 (2005).

25 "Cruelty exists if the victim consciously experienced physical or mental pain prior to
26 death and the defendant knew or should have known that suffering would occur. Mental
27 anguish includes a victim's uncertainty about [his] ultimate fate." *State v. Bearup*, 221 Ariz.
28 123, ¶ 48, 211 P.3d 684, 693 (2009) (citations omitted); *see also State v. Tucker* 215 Ariz.
29 298, 160 P.3d 177 (2007). Only where there is no evidence that the victim suffered physical

1 or mental pain or the evidence is inconclusive have Arizona courts held that cruelty was not
2 shown. *Getzler* at 51, 659 P.2d at 10; *see also State v. Bishop*, 127 Ariz. 531, 534, 622 P.2d
3 478, 481 (1981); *State v. Ceja*, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980); *State v. Ortiz*,
4 131 Ariz. 195, 210, 639 P.2d 1020, 1035 (1977).

5 A "factor we have found to demonstrate a heinous or depraved state of mind is the
6 infliction of gratuitous violence on the victim." *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d
7 1, 10 (1983).
8

9 We think that defendant's conduct in continuing his barrage of
10 violence, inflicting wounds and abusing his victims, beyond the
11 point necessary to fulfill his plan to steal, beyond even the
12 point necessary to kill, is such an additional circumstance of a
13 * * * depraved nature so as to set it apart from the "usual or the
14 norm." 126 Ariz. at 40, 612 P.2d at 496, quoting *State v. Ceja*,
15 supra, 115 Ariz. at 417, 565 P.2d at 1278.

16 *Gretzler*, at 42, 51, 659 P.2d 1, 10 (1983).

17 Gratuitous violence "may be demonstrated by the continued infliction of violence
18 after the defendant knew or should have known that a fatal action had occurred." *State v.*
19 *Bearup*, 221 Ariz. 163, ¶ 52, 211 P.3d 684, 694 (2009). In *State v. Hyde*, 186 Ariz. 252, 281,
20 921 P.2d 655, 684 (1996), the defendant beat his victim on the head with a Bowie knife until
21 the bone was visible and the victim was bleeding profusely. The Arizona Supreme Court
22 held "that defendant's repetitive bludgeoning of both victims was an act of gratuitous
23 violence."

24 The bludgeoning continued after both victims were dead with
25 their skulls shattered from the force of the repeated blows. ...
26 In both cases, the blows were delivered with sufficient force
not only to shatter the bone but to cut and tear the brain tissue
by forcing the bone fragments into it.

Id.

1 Defendant's argument regarding the (F)(6) aggravator is without merit.

2 ***F. A.R.S. § 13-703(F)(5)***

3 The (F)(5) aggravator was properly alleged and this Court found there was sufficient
4 probable cause to sustain the aggravator. "Under A.R.S. § 13-703(F)(5), a first degree
5 murder is aggravated if the homicide was committed 'as consideration for the receipt, or in
6 the expectation of the receipt, of anything of pecuniary value.'" *State v. Martinez*, 218 Ariz.
7 421, 435, 189 P.3d 348, 435 (2008). "Specifically, the state must prove that pecuniary gain
8 was a 'motive, cause or impetus for the murder and not merely the result.'" *State v. Canez*,
9 202 Ariz. 133, 159, 42 P.3d 564, 590 (2002) (quoting *State v. Kayer*, 194 Ariz. 423, 433, 984
10 P.2d 31, 41 (1999)); *see also Moormann v. Schriro*, 426 F.3d 1044, 1054 (9th Cir. 2005).
11 Defendant's claim the standard for the pecuniary gain will be left to the "eye of each
12 beholder" ignores that fact that this Court will give all appropriate instructions to the jurors.
13

14 ***G. Ariz. R. Crim P., Rule 15***

15 This issue is currently pending before this Court.

16 **CONCLUSION:**

17 Whereas Defendant has failed to show that the death penalty is unconstitutional, the
18 motion "The Penalty of Death is Unconstitutional" should be summarily dismissed.
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1 RESPECTFULLY SUBMITTED this 1ST day of March, 2010.

3 Sheila Sullivan Polk
4 YAVAPAI COUNTY ATTORNEY

5 By: Joseph C. Butner
6 Deputy County Attorney
7

8
9 COPIES of the foregoing delivered this
10 1st day of March, 2010 to:

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